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FILED

MAR 7 1990

JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1227

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CSXT, INC.,

Petitioner,

vs.

JAMES J. PITZ, DIRECTOR OF THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF MICHIGAN, NORMA J. FLEMING, ADMINISTRATOR OF THE RAILROAD SAFETY AND TARIFFS DIVISION OF THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF MICHIGAN and THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF MICHIGAN

and

UNITED TRANSPORTATION UNION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

(Petitioner is satisfied that the questions presented in its Petition fully encompassed its appeal. However, State Respondents' Brief totally changes the State's prior position that the Michigan Department of Transportation's (MDOT) Rule requires toilets on locomotives in Michigan. As a result, Petitioner is compelled to submit the following additional question.)

V. Whether MDOT, having contended in administrative proceedings, the District Court and the Court of Appeals that its Rule requires toilets on locomotives in Michigan, may in this Court reverse its position and argue that the Rule is subject to other interpretations which, if true, may defeat Petitioner's assertion of a "facially conclusive" preemption challenge.

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STATEMENT OF THE CASE

Petitioner's Statement of the Case is fully set forth at pp. 4-5 of the Petition.

ARGUMENT

I

MDOT'S RULE 460.1473(a) REQUIRES TOILETS ON LOCOMOTIVES IN MICHIGAN

Both MDOT and Respondent United Transportation Union (UTU) recognize that a key issue in this Court's granting CSXT's Petition for Certiorari is whether abstention is appropriate to a facially conclusive preemption claim. They now argue that Michigan's Rule 460.1473(a) is not specific, is subject to other interpretations and may not apply to locomotives.

This is a total change of position by MDOT. Never, at any stage of this case, has MDOT denied that its Rule 460.1473(a) requires toilets on locomotives. MDOT has affirmatively stated many times in the District Court and the Court of Appeals that its Rule does require toilets on locomotives. As a result, Petitioner must reply and supplement its Petition Appendices to demonstrate the plain meaning of Rule 460.1473(a) and MDOT's complete departure from its previous position in this case up to this time.

In the lower courts, all parties in prior pleadings and briefs have referred only to one section of Michigan's rules respecting sanitation and shelter for railroad employees.

This Section, R-460.1473, states:

Section 3—Running facilities.

(a) Adequate toilet facilities shall be made available for trainmen, enginemen and yardmen, after hearing thereon and order by the commission, which toilet facilities shall be kept in a reasonably clean and sanitary condition.

Because MDOT never before challenged that R460.1473(a) required toilets on all locomotives, nothing more was needed. MDOT and CSXT knew what the Rule meant

and said so. MDOT's attempted change of position makes it now necessary to set out the definitions and other sections applicable to the Rule. The entire "Rules and Regulations Relating to Sanitation and Adequate Shelter for Certain Railroad Employees" is appended hereto as Appendix A. (MICH. ADM. CODE, Rules 460.1471 through 460.1481).

"Running facilities" are defined in Section 1 as sanitation or shelter facilities on *"engines, trains or cabooses"*. (Emphasis added). Engines are locomotives. The terms are used interchangeably in these Rules (See Appendix A, p. A-4, Section 3(e)).

Further, the rules are divided into sections clearly describing the various types of railroad facilities and the sanitation and shelter requirements for each. "Running facilities" are engines, trains and cabooses. "Localized facilities" relate to fixed location duty points. "Crossing watchmen facilities, Camp facilities" and "Section Houses" are each separately defined and regulated. (See Appendix A, pp. A-2, A-4, A-5, A-6).

The rules require various and different sanitation items depending on the nature of the railroad work and facility defined. For locomotives, toilet facilities are required. This was clear to MDOT's Administrative Law Judge when she stated "Rule 460.1473 is specific and to the point,---" (Petition Appendix G-18). It was also clear to the District Court Judge when he stated that MDOT "argued its position assuming that enforcement of Rule 460.1473(a) would require equipping locomotives with commodes." (Petition Appendix D-3). Finally, it was clear when the District Court concluded:

> Accordingly, this Court determines that the LBIA and the FRSA each preempt Rule 460.1473(a) insofar as it is construed to require commodes on locomotives operating in Michigan. (Petition Appendix D-10)

In the face of the plain language of the Rule, MDOT's administrative action shown in Petition Appendix G and MDOT's prior consistent position throughout this case, it is folly

to say to this Court at this time that the Rule may not require toilets on locomotives. It simply cannot be said that a rule requiring adequate toilet facilities on engines, trains or cabooses (i.e. running facilities) can be satisfied by providing toilets "off the train entirely". (State Respondent's Brief, p. 29).

Beyond the Rule itself, this case, from its inception, has dealt with toilets on locomotives. UTU's Complaint and MDOT's administrative proceedings make this crystal clear.

UTU's first complaint to MDOT (Petition Appendix G-1 and G-2) complains that the railroad has put into use engines which are "in violation of the Department's Rules and Regulations Relating to Sanitation and Adequate Shelter for Certain Railroad Employees.---These SCL engines do not have toilets---".

MDOT then gave notice of an inspection based on the UTU Complaint of alleged violation of the Department's Rules and Regulations Relating to Sanitation and Adequate Shelter for Certain Railroad Employees --- "when SCL engines are put into use that do not have toilets ---". The Notice included the request that the railroad company have SCL locomotives available for inspection. (Petition Appendix G-3 and G-4).

Next, MDOT issued its Report Transmittal and Report of Inspection, each under the case heading referring to alleged violation of the Department's Rules and Regulations by the railroad---"when SCL engines are put into use that do not have toilets" etc. The Report of Inspection makes four specific recommendations:

> Therefore the following recommendations are made and The Chesapeake and Ohio Railway Company shall:
>
> —Upon the first quarterly maintenance of any engine being used in Michigan, equip same with the proper toilet facilities and equipment as specified in the Department's Rules and Regulations (those conditions being found in SCL Unit 6667 acceptable);

—Provide a copy of its written instructions pertaining to the installation of the necessary facilities and equipment to this office within 30 days;

—Provide to this office a written statement as to an anticipated completion date of work on all engines being used in Michigan;

—In the interim, issue instructions to its employees limiting the use of any engine not properly equipped to trailing units only in a yard where toilet facilities are available. Provide a water cooler with cool water and drinking cups on same. Send copy of bulletin to this office. (Petition Appendix G-6—G-10).

MDOT's Report Transmittal contains the following directive:

Written confirmation of compliance to the recommendations contained in the subject report shall be provided to this office. (Petition Appendix G-7).

Next, MDOT's Administrative Law Judge issued a Notice of Hearing under the following heading:

In the matter of Complaint by the United Transportation Union and the Brotherhood of Locomotive Engineers of violation of Michigan Department of Transportation Rule No. R 460.1473(a) by absence of toilets as sanitary facilities on CSX Transportation, Inc. locomotives used in Michigan. (Petition Appendix G-12)

Finally, MDOT's Administrative Law Judge issued an Order denying CSXT's Motion to Stay Administrative Proceedings under the same case heading cited above. In that Order are two statements particularly applicable here:

Rule 460.1473 is specific and to the point, and since it promotes the health, safety and welfare of the citizens of this state, its passage and enforcement are well within the police powers of the State of Michigan. (Petition Appendix G-18 and G-19).

The specific Rule involved in this action does not relate to the *mechanical operation of a locomotive nor to any*

> *appurtenances, but to sanitary facilities* normally available to travelers and not available on the route taken by railroads. (Petition Appendix G-19). (emphasis added).

The conduct and writings of UTU and MDOT in these administrative proceedings speak volumes. The Rule requires toilets on locomotives and both UTU and MDOT were determined to have toilets on all CSXT locomotives used in Michigan.

To summarize, the Union complained that some CSXT locomotives in Michigan did not have toilets. Based on the Complaint, MDOT held an Inspection and recommended that CSXT shall equip, with proper toilet facilities and equipment, as specified in MDOT's rules and regulations, any engine being used in Michigan. MDOT further required that CSXT provide it with written instructions pertaining to the installations, a written statement as to the anticipated completion date of work on all engines being used in Michigan and that CSXT issue instructions to its employees limiting the use of any engine not properly equipped. MDOT required written confirmation of compliance with those recommendations. MDOT's Administrative Law Judge commenced a formal proceeding on the UTU Complaint of violations of MDOT's Rule 460.1473(a) *by absence of toilets as sanitary facilities on CSXT locomotives in Michigan.*

After all this, we are now told by MDOT (as well as by UTU) that this Rule does not require toilets on locomotives. Indeed, we are told that it may relate to toilets along the tracks and off the train entirely. It is clear from the administrative proceedings, that until abstention became an issue and with it the threat to Respondents of a "facially conclusive preemption claim", both MDOT and UTU, along with CSXT, were satisfied that Michigan's Rule required toilets on all locomotives.

If any doubt at all remains as to MDOT's interpretation of the Rule, CSXT has attached hereto as Appendix B and Appendix C portions of briefs filed by MDOT in the District

Court and in the Court of Appeals. In the District Court brief, under INTRODUCTION AND SUMMARY OF ARGUMENT, are found the following two statements:

> The State of Michigan, Department of Transportation, requires railroads to make available on their locomotives adequate toilet facilities for the health and welfare of their trainmen, enginemen and yardmen.
>
> In the case at bar, the State of Michigan has acted to further railroad safety and to promote the health and welfare of its citizens by adopting a rule requiring toilets on locomotives. (Appendix B, p. B-2).

On the last page of this brief, under CONCLUSION AND REQUEST FOR RELIEF is the following statement:

> Rule 460-1473(1) requiring toilets on locomotives relates to railroad safety. (Appendix B, p. B-4).

Similarly, in its Brief of Defendants-Appellants filed with the Sixth Circuit Court of Appeals, MDOT again affirmatively and without equivocation restated its position that its Rule required toilet facilities on locomotives. In the TABLE OF CONTENTS (Appendix C, p. C-2) MDOT's arguments are entitled as follows:

I. MICHIGAN'S RULE REQUIRING TOILET FACILITIES ON LOCOMOTIVES IS NOT PREEMPTED BY THE FEDERAL RAILROAD SAFETY ACT BECAUSE NO FEDERAL RULE HAS BEEN ADOPTED COVERING THE SAME SUBJECT MATTER

II. MICHIGAN'S RULE REQUIRING TOILET FACILITIES ON LOCOMOTIVES IS NOT PREEMPTED BY THE BOILER INSPECTION ACT BECAUSE THE BOILER INSPECTION ACT DOES NOT APPLY TO SANITARY FACILITIES AND BECAUSE THERE IS NO FEDERAL RULE COVERING THE SAME SUBJECT MATTER

The first sentence of the brief states:

> This case is an appeal from the United States District Court's entry of a permanent injunction restraining the Michigan Department of Transportation (hereinafter referred to as the "Department") from enforcing its administrative rule requiring adequate sanitary facilities on locomotives and a judgment declaring Michigan's rule preempted by federal law. (Appendix C, p. C-6).

After STATEMENT OF FACTS is found:–

1. The Michigan Department of Transportation's Rule was duly promulgated and requires railroads to make available on their locomotives adequate sanitary facilities for the health and welfare of their trainmen, enginemen and yardmen. (Appendix C, p. C-10).

At the end of the brief, under CONCLUSION AND REQUEST FOR RELIEF, MDOT says:

> Rule 460.1473(1) requiring toilets on locomotives relates to railroad safety. (Appendix C, p. C-13).

Based on the foregoing, Petitioner asks this Court to hold Respondent MDOT to its established position that its Rule requires toilets on locomotives in Michigan. This done, Petitioner's preemption claim remains facially conclusive and abstention is not warranted.

II

THE COURT OF APPEAL'S FAILURE TO ASSESS CORRECTLY THE TOTAL PREEMPTIVE EFFECT OF LBIA AND FRSA AS TO LOCOMOTIVE EQUIPMENT UNDER THE UNDISPUTED FACTS OF THIS CASE VITALLY AND ADVERSELY AFFECTS PETITIONER'S FACIALLY CONCLUSIVE PREEMPTION CLAIM

Both UTU and MDOT would have this Court ignore two holdings of the Court of Appeals as irrelevant and related to preemption rather than abstention. Those holdings were vital to the Court of Appeal's ultimate application of *Younger* abstention to Petitioner's preemption claim.

First, the Sixth Circuit held that "[t]he Act [LBIA, 45 USC §22-43] *does not prohibit concurrent state regulation* or purport to occupy the field of railroad [regulation]." (Emphasis added). Next, the Court held that the Federal Railroad Safety Act (FRSA), 45 USC §421-44, allows limited concurrent state regulation. (Petition Appendix B, p. B-4). Obviously, one cannot present a facially conclusive preemption claim if the involved federal law permits concurrent state regulation of the same subject.

The problem with the Court of Appeals finding here is that the LBIA regulates only locomotive equipment and *does* prohibit concurrent state regulation of locomotive equipment. (See *Napier* vs. *Atlantic Coastline*, 272 US 605, 47 S. Ct. 207, 71 L. Ed. 432 (1926), and cases cited in the Petition, pages 6, 7 and 8).

This same reasoning applies to the Circuit Court's treatment of FRSA. Obviously, FRSA does allow state regulation until the Secretary of Transportation has adopted a rule, regulation, order or standard covering the subject matter of the state requirement. When the "subject matter" has been covered by such a federal rule, FRSA *does prohibit* concurrent statewide regulation. Petition Appendix E, the Federal Railroad Administration Locomotive Safety Standards, are the federal rules covering the *subject matter* of Michigan's Rule requiring toilets on locomotives. (See Petition, p. 11).

Once the Court of Appeals incorrectly concluded that there was room for concurrent state regulation of locomotive equipment under both the LBIA and FRSA, there was no need for it to consider whether *Younger* abstension should apply to a facially conclusive preemption claim.

The Circuit Court's incorrect assessment of the total preemptive effect of LBIA and FRSA in this case must be corrected before this Court can determine whether the Sixth Circuit erred in finding *Younger* abstention appropriate here.

III

MDOT'S ADMINISTRATIVE PROCEEDINGS WERE NOT "JUDICIAL IN NATURE"

Both Respondents' argue that Michigan's constitutional separation of powers does not prevent MDOT's administrative proceedings from rising to the level of "judicial in nature". The provisions of Michigan's Administrative Procedures Act (MCLA §24.271-24.282, 24.285-24.287) do not change the fact that MDOT is expressly denied judicial powers by Michigan's Constitution. Respondents' reliance on *Prentis* vs. *Atlantic Coastline Company,* 211 US 210, 29 S. Ct. 67, 53 L. Ed. 150 (1908), fails. The state agency in *Prentis* was the Virginia State Corporation Commission which, under Virginia law, was vested with both legislative and judicial powers. Such is not the case with MDOT.

Finally, both MDOT and UTU ignore *Detroit & Mackinaw Railway* vs. *Michigan Railway Commission,* 235 US 403 (1914), wherein Michigan's Constitution with its separation of powers was contrasted with Virginia's (Prentis) which affirmatively granted dual powers. (See Petition, pp. 16-17).

The Michigan statutes cited in Petition Appendix F demonstrate the absence of judicial power in MDOT. A *judicial proceeding* in a court is required to enforce MDOT's rules and orders.

CONCLUSION AND RELIEF SOUGHT

For the reasons set forth in the Petition and in this Reply Brief, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

APPENDIX A

RULES AND REGULATIONS RELATING TO SANITATION AND ADEQUATE SHELTER FOR CERTAIN RAILROAD EMPLOYEES

By authority of Act No. 3, Public Acts of 1939, as amended [CL 1948, §460.1]

R 460.1471. Section 1—Definitions

The words and phrases used herein shall be construed as follows, unless the context shall otherwise require:

(a) The term "localized facilities," when used herein, shall mean those facilities of sanitation or shelter for the welfare and health of railroad trainmen, enginemen and yardmen, which facilities are to be maintained at points where employees are required to report for duty or are relieved from duty.

(b) The term "highway crossing shanty," when used herein, shall mean a building at which public highway crossing watchmen are regularly stationed for performance of their duties.

(c) The term "running facilities," when used herein, shall mean those facilities of sanitation or shelter to be maintained on engines, trains or cabooses for the welfare and health of railroad trainmen, enginemen and yardmen.

(d) The term "camp facilities," when used herein, shall mean those facilities of sanitation or shelter for the welfare and health of maintenance of way employees, when such facilities are to be maintained at railroad camps of a permanent or seasonal nature, or are located in movable cars when used for housing maintenance of way employees.

(e) The term "crossing watchmen," when used herein, shall include such employees as are used in the flagging of public highway crossings or in the actual operation of manually controlled gates, public highway crossing signals, or other appurtenances having to do with the protection of such crossings.

(f) The term "section house facilities," when used herein, shall mean the shelter facilities maintained for maintenance of way employees at points where such employees report for duty or are relieved from duty.

HISTORY: ACS 18, p. 45.

R 460.1472. Sec. 2—Localized facilities

Adequate localized facilities, as defined in section 1 (a) hereof, consisting, as in each location may be necessary, of the following facilities, installed and maintained as specified, shall be furnished by all railroad companies under the jurisdiction of this commission, if, in the judgment of the commission, such facilities, or any of them, are necessary for the welfare and health of the above mentioned employees:

(a) There shall be provided a locker room, separate from the toilet room by solid partitions, where the employees may change their clothing. The area of such room shall not be less than 80 square feet of clear floor space for 10 employees, and adequate space to be added for additional employees.

Necessary benches and tables shall be provided.

(b) Where lockers are not now provided, a sufficient number of metal lockers shall be provided, the dimensions of which shall not be less than 72 inches high, 15 inches wide and 18 inches deep, save that, in such locations where larger lockers shall be deemed necessary, they shall be provided as shall be agreed to between the railroad company and its employees. Said lockers shall be equipped on the inside with a top shelf, and not less than 1 clothes hook on each side, a hanger bar, and also sufficient openings in the door for the purpose of ventilation.

(c) Where running water and sewers are reasonably available or where physical conditions and ordinances permit the use of septic tanks in lieu of sewers, hot and cold running

water, sufficient wash bowls and shower facilities, and flush toilets in accordance with the following minimum requirements, shall be provided:

Number of Persons	Number of Toilets
1 to 10	1
11 to 24	2
25 to 49	3
50 to 100	5
100 or over	1 for each additional 25 persons

(d) Wherever urinals are provided, 1 urinal may be substituted for 1 toilet, provided the number of toilets shall not be reduced to less than ⅗ the number shown in the above table.

(e) If practical, every toilet room shall be so located as to open to the outside light and air by windows or skylights.

(f) All inside toilet facilities shall be made of materials impervious and resistant to moisture, and shall be fitted with individual flush systems. In the case of urinals, the water may be allowed to run continuously.

(g) The walls of compartments or partitions between toilet fixtures may be less than room height, but the top shall not be less than 5 feet from the floor and the bottom not more than 1 foot from the floor.

(h) An adequate supply of cool, sanitary water, satisfactory for drinking purposes, shall be made available to all employees. Where necessary, this water shall be provided in suitable sanitary containers, conveniently placed for the use of the above mentioned employees, and each container will be equipped with a faucet or other dispenser. The company shall furnish individual drinking cups.

(i) Locker and toilet rooms shall be adequately heated, ventilated, lighted, and provided with screens, and said facilities shall be kept reasonably clean by the employer.

HISTORY: ACS 18, p. 46.

R 460.1473. Sec. 3—Running facilities

(a) Adequate toilet facilities shall be made available for trainmen, enginemen and yardmen, after hearing thereon and order by the commission, which toilet facilities shall be kept in a reasonably clean and sanitary condition.

(b) All yard diesels shall have the floors cleaned and the windows washed at reasonable intervals.

(c) All cabooses shall have the interior washed once each year. Road cabooses used on trains handling ore in open top equipment, and all yard and transfer cabooses, shall have the floors scrubbed or mopped once each month. Other road cabooses on any run shall have the floors scrubbed or mopped once each month, if the crew using same request it.

Windows on all cabooses shall be washed once a month, except in freezing weather.

(d) When required by the season of the year, doors and windows of cabooses shall be equipped with adequate metal stripping. Similarly, when required by the season of the year, cabooses shall be equipped with screen doors or screen panels, and windows on each side of each caboose shall be screened. Sliding screen windows, however, shall be deemed adequate.

(e) An adequate supply of cool, sanitary water, satisfactory for drinking purposes, shall be made available for the use of trainmen, enginemen and yardmen. Suitable sanitary containers, equipped with a faucet or other dispenser, shall be maintained on cabooses and locomotives, and individual drinking cups shall be furnished by the company.

(f) Every caboose used in any train in this state, regardless of service, shall be provided with a stove or other adequate means of heating. A sufficient amount of fuel for the trip or shift shall be made available.

(g) Baggage and express cars, when occupied by employees coming under the provisions of this act, will be so arranged

in the train that employees required to ride such cars will have access to the drinking water, toilet and washing facilities provided in a coach in said train; and, if it is found impractical to so arrange said cars in the train, then drinking water, toilet and washing facilities must be furnished for the employees riding said cars upon formal order of and by the commission.

HISTORY: 1944 ACS 18, p. 46; 1954 AC, p. 6324; 1954 ACS 1, p. 35.

R 460.1474. Sec. 4—Crossing watchmen facilities

(a) Adequate shelter shall be furnished for crossing watchmen, and said shelter shall be properly sealed and insulated against cold, and heated.

(b) If, in the judgment of the commission, it is practical, toilet and washing facilities will be furnished as the commission may require, after inspection and agreement or hearing in the matter.

HISTORY: ACS 18, p. 47.

R. 460.1475. Sec. 5—Camp facilities

(a) When employees are furnished meals in camp cars, as hereinbefore defined, adequate sanitary facilities and space shall be provided.

(b) Where cars, other than passenger coaches, are furnished for sleeping quarters, cars shall not house over 10 men each. Where passenger coaches are furnished, the commission may designate the number of men to be housed in each coach.

(c) All camp cars will be properly heated, ventilated, sealed and lighted, and, during the period of the year in which insects are prevalent, the doors and windows will be screened.

(d) All extra and permanent gangs will be furnished with shower car, with running hot and cold water. Adequate toilet facilities will be furnished for all employees.

(e) Camp man or janitor will be furnished for all gangs over 20 men for the purpose of keeping the cars and grounds in a clean and sanitary manner.

(f) When extra and permanent gangs are furnished with kitchen car or cars, the same shall be well equipped with adequate kitchen facilities. Such kitchen cars shall be maintained in a clean and sanitary condition.

HISTORY: ACS 18, p. 47.

R 460.1476. Sec. 6—Section houses

Adequate shelter facilities, located in section houses or other suitable buildings, consisting, as in the individual case may be necessary, of the following appliances, installed and maintained as specified, shall be furnished by all railroad companies under the jurisdiction of this commission for regularly assigned maintenance of way employees, at points where such employees are required to report for duty or are relieved from duty, as, in the judgment of the commission, after investigation, and hearing, if requested, such facilities, or any of them, are necessary for the welfare and health of the above mentioned employees:

(a) There shall be provided space, adequate for the number of employees using said facilities, where employees may change their clothing, furnished with tables and benches or chairs, in accordance with the number of employees using the facilities. Where lockers are not now provided, and the same are requested by the employees using the individual facility, a sufficient number of metal lockers shall be provided to meet the requirements of said employees.

(b) During the period of the year in which insects are prevalent, screens will be furnished for the windows and doors.

(c) The space designated as shelter will be partitioned, sealed and adequately heated and lighted.

(d) Where running water and sewerage facilities are reasonably available, flush toilets and washing facilities will be provided. Otherwise, an outside toilet will be furnished and maintained in accordance with the provisions of section 7:

Provided, however, The provisions of this sub-section shall not be applicable where toilets and washing facilities are otherwise made reasonably available for maintenance of way employees.

(e) If necessary, a sufficient supply of running or well water will be made reasonably available, and individual drinking cups will be furnished.

HISTORY: ACS 18, p. 47.

R 460.1477. Sec. 7—Construction and maintenance of outside toilets when used by employees coming under the provisions of this act.

(a) The commission may, after proper investigation, hearing and order in the matter, permit the installation and maintenance of outside toilet facilities, where it is found otherwise impractical to install inside toilets and urinal facilities.

(b) Where outside toilets are installed and maintained in accordance with the above paragraph, they shall be located on ground that is well drained, and where there is no possibility of contaminating any drinking water supply.

(c) Suitable approach, such as concrete, gravel, or cinder walk, shall be provided.

(d) All windows, ventilators, and other openings, except doors, shall be screened to prevent the entrance of insects. A separate ventilator duct, with hood, shall be provided for the vault, and shall extend above the roof.

(e) The entire installation must be kept clean and sanitary. Milk of lime (freshly slaked lime), or other equally effective disinfectant, shall be used in the vault and in the urinal trough, in sufficient quantities and at frequent intervals. The floors, seats and urinals must be scrubbed as often as necessary.

HISTORY: ACS 18, p. 48.

R 460.1478. Sec. 8

Any shelter and sanitary facilities which have been constructed and are presently being maintained in accordance with an agreement heretofore entered into between the parties in interest, and agreed to or ordered by the commission, shall be deemed a complete compliance with these rules and regulations, until such time as a specific complaint is filed with the commission claiming that, on account of changes made in the uses of the facilities, such facilities are inadequate: Provided, Nothing herein shall be construed to abrogate or limit any agreement between the interested parties now in effect which provides for better or more adequate facilities, or to prevent the negotiation of such an agreement in the future.

HISTORY: ACS 18, p. 48.

R 460.1479. Sec. 9

Any railroad company being of the opinion that the application or enforcement of this order, or any part thereof, at any particular place, will be unjust or unreasonable, may apply to the commission for relief therefrom, and the commission may, by written order, relieve said railroad company from the application of this order, or any part thereof, at such place, or modify the same in such manner and to such extent as shall be just and reasonable.

HISTORY: ACS 18, p. 48.

R 460.1480. Sec. 10

In the absence of specific complaint, present facilities shall be deemed adequate. In the event of a complaint filed hereafter in respect of such facilities, and the commission shall find the same inadequate, the railroad company involved shall have a reasonable time in which to complete the work required in the light of the then existing situation, circumstances and conditions.

HISTORY: ACS 18, p. 48.

R 460.1481. Sec. 11

In the event of any dispute or disagreement between any employee and any employer as to the intent, meaning and interpretation of any or all of the rules hereinabove set forth, the commission reserves unto itself the right to set a hearing thereon, and to issue appropriate order or orders, so as to effectuate and carry out the intent and purpose of said rules.

HISTORY: ACS 18, p. 48.

APPENDIX B

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CSXT, INC.
a Virginia Corporation,

Plaintiff,

Case No. L88-17CA5
HON. ROBERT HOLMES BELL

v

JAMES J. PITZ, Director of the Department of Transportation of the State of Michigan, NORMA J. FLEMING, Administrator of the Railroad Safety and Tariffs Division of the Department of Transportation of the State of Michigan and The Department of Transportation of the State of Michigan,

Defendants,

and

UNITED TRANSPORTATION UNION,

Intervening Defendant.

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STATE DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION AND SUMMARY OF ARGUMENT

The State of Michigan, Department of Transportation, requires railroads to make available on their locomotives adequate toilet facilities for the health and welfare of their trainmen, enginemen and yardmen. CSXT operates its railroad system within the State of Michigan utilizing locomotives that have no toilets. Seeking to avoid the State of Michigan's enforcement of its rule against CSXT, the Railroad enlists the aid of this Court to declare the State's rule preempted by two Acts of Congress: the Boiler Inspection Act of 1911, as amended in 1915, and the Federal Railroad Safety Act of 1970.

In any preemption case, the Court's task is to ascertain whether it was the intent of Congress to totally occupy the field in which the State has acted. *In the case at bar, the State of Michigan has acted to further railroad safety and to promote the health and welfare of its citizens by adopting a rule requiring toilets on locomotives.* The question facing this Court, therefore, is whether it is the intent of Congress to totally occupy the field of railroad safety so as to displace the State police power so exercised.

The two acts proffered by CSXT as a basis for finding such a total occupation both deal with railroad safety. The 1911 Act, as amended in 1915, is strictly limited to locomotive safety. None of the Act's sections address preemption and no legislative history is available to examine. One 1926 opinion of the United States Supreme Court sheds the only light on the issue in which the Court found a total occupation of the field of locomotive safety based on the statutes in force at that time.

In contrast, recognizing that the amended 1911 Act had served well, but was too limited in scope, Congress passed the 1970 Act to comprehensively address the entire field of railroad safety. In doing so, it expressly assigned a role to the States in this area and provided a detailed legislative history leaving no question about its intent.

CSXT urges this Court to preempt the State's rule on the basis of a 1926 case guessing at the intent of a 1915 Congress.

The State Defendants, on the other hand, urge this Court to be guided by Congress' own statement of its intent more recently expressed in an unambiguous 1970 statute, which will compel the conclusion that the State of Michigan's rule is *not* preempted and should be declared enforceable against CSXT. Support for this conclusion is set forth below, beginning with analysis of the Federal Railroad Safety Act, followed by examination of the Boiler Inspection Act.

LAW AND ARGUMENT

A.

MICHIGAN'S RULE REQUIRING TOILET FACILITIES ON LOCOMOTIVES IS NOT PREEMPTED BY THE FEDERAL RAILROAD SAFETY ACT BECAUSE NO FEDERAL RULE HAS BEEN ADOPTED COVERING THE SAME SUBJECT MATTER

Michigan's Rule appears in the 1979 Michigan Administrative Code as follows:

> "R 460.1473 Running facilities.
>
> "Rule 3. (1) Adequate toilet facilities shall be made available for trainmen, enginemen and yardmen, after hearing thereon and order by the commission, which toilet facilities shall be kept in a reasonably clean and sanitary condition." 1979 AC, R 460.1473(1) (hereinafter referred to as Rule 460.1473(1)). (A copy of Rule 460.1473(1) is attached hereto as Appendix A.)

The first question presented is whether Rule 460.1473(1) is preempted by the Federal Railroad Safety Act of 1970, 45 U.S.C. §§ 421-44 (1976).

CONCLUSION AND REQUEST FOR RELIEF

Congress must express in terms permitting no other conclusion its intent to preempt the historic police powers of the States when exercising its Federal commerce power. In 1926,

Congressional intent to preempt State police powers in the field of locomotive safety was inferred by judicial construction. In 1970, that inference was repudiated. In 1970, Congress expressed in clear and unmistakable terms its intent to *permit,* not *prohibit,* the exercise of State power to promote rail safety. Congress ordained that the States may adopt *"any"* rule "relating to railroad safety" unaddressed by specific Federal action.

Rule 460.1473(1) requiring toilets on locomotives relates to railraod safety. No Federal rule has been adopted covering the subject matter of locomotive sanitation. The conclusion is inescapable that Rule 460.1473(1) is not preempted. Any other construction turns the Federal Railroad Safety Act on its head.

For all the reasons stated above, the State Defendants respectfully urge that this Court enter its Order denying Plaintiff's Motion for Summary Judgment and instead granting judgment in favor of the Defendants declaring Rule 460.1473(1) valid and enforceable. In the alternative, Defendants request that this Court deny Plaintiff's Motion for Summary Judgment on the ground that further proceedings are needed to resolve genuine issues as to material facts.

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Dated: April 8, 1988

APPENDIX C

APPENDIX C

88-1642

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CSXT, INC., A Virginia Corporation
Plaintiff—Appellee

v.

District Court
File No. L88-17CA5

JAMES J. PITZ, Director of the Department of Transportation of the State of Michigan; NORMA J. FLEMING, Administrator of the Railroad Safety and Tariffs Division of the Department of Transportation of the State of Michigan; DEPARTMENT OF TRANSPORTATION OF THE STATE OF MICHIGAN;
Defendants-Appellants

UNITED TRANSPORTATION UNION
Intervening Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN HONORABLE ROBERT HOLMES BELL

BRIEF OF DEFENDANTS-APPELLANTS

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Dated: August 26, 1988

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I.

WHETHER MICHIGAN'S RULE REQUIRING SANITARY FACILITIES ON LOCOMOTIVES **IS PREEMPTED BY THE FEDERAL RAILROAD SAFETY ACT.**

II.

WHETHER MICHIGAN'S RULE REQUIRING SANITARY FACILITIES ON LOCOMOTIVES **IS PREEMPTED BY THE BOILER INSPECTION ACT.**

88-1642

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CSXT, INC., a Virginia Corporation

Plaintiff-Appellee

v.

District Court
File No. L88-17CA5

JAMES J. PITZ, Director of the Department of Transportation of the State of Michigan; NORMA J. FLEMING, Administrator of the Railroad Safety and Tariffs Division of the Department of Transportation of the State of Michigan; DEPARTMENT OF TRANSPORTATION OF THE STATE OF MICHIGAN;

Defendants-Appellants

UNITED TRANSPORTATION UNION

Intervening Defendant-Appellant

DEFENDANTS-APPELLANTS' BRIEF ON APPEAL

STATEMENT OF THE CASE

This case is an appeal from the United States District Court's entry or a permanent injunction restraining the Michigan Department of Transportation (hereinafter referred to as the "Department") from enforcing its administrative rule requiring adequate sanitary facilities on locomotives and a judgment declaring Michigan's rule preempted by federal law. The Plaintiff-Appellee CSXT, Inc. (hereinafter referred to as

"CSXT"), operates a railroad system in Michigan and other states. Defendant-Appellant James Pitz is the Director of the Department of Transportation and Defendant-Appellant Norma J. Fleming is Administrator of the Railroad Safety and Tariffs Division of the Michigan Department of Transportation (herein referred to collectively with the Defendant-Appellant Michigan Department of Transportation as the "State"). The Intervening Defendant-Appellant is a union representing the interests of rail workers.

State's Administrative Proceedings

The course of proceedings in this case began on January 6, 1988 when Hearing Officer Virginia A. Dean served on CSXT a Notice of Hearing scheduled for February 10, 1988, on separate complaints filed by the United Transportation Union (hereinafter referred to as "UTU") and the Brotherhood of Locomotive Engineers. [See R. 17: Affidavit of W. VanderVeer in Support of Plaintiff's Motion for Summary Judgment (hereinafter VanderVeer Affidavit), Ex A-7.] The complaints had been filed with the Railroad Safety and Tariffs Division of the Department alleging that certain CSXT locomotives operating in Michigan lacked toilet facilities (R. 17: VanderVeer Affidavit, Ex A-4) as required by Department Rule 460.1473(1) which appears in the 1979 Michigan Administrative Code as follows:

> "R 460.1473 Running facilities.
>
> "Rule 3. (1) Adequate toilet facilities shall be made available for trainmen, enginemen and yardmen, after hearing thereon and order by the commission, which toilet facilities shall be kept in a reasonably clean and sanitary condition." [Hereinafter referred to as the "Department's Rule" or "Rule 460.1473(1)".]

On January 21, 1988, CSXT filed with the Department's Office of Administrative Law Hearings a Motion to Stay Administrative Proceedings on the ground that CSXT had filed

a suit for injunctive and declaratory relief in federal district court alleging that the Department's Rule was preempted by two acts of Congress. (See R. 17: VanderVeer Affidavit at p 4, ¶ 11.) A hearing was held on CSXT's Motion on January 27, 1988 before Hearing Officer Dean at which argument was presented by counsel for CSXT, the Department and one of the two complainants, UTU. (See R. 17: VanderVeer Affidavit at p 4, ¶ 12.) By order issued that same day, Hearing Officer Dean denied CSXT's Motion to Stay on the ground that no authority had been presented requiring deviation from the statutorily established administrative framework and on the further ground that administrative agencies were not authorized to pass on constitutional questions, such as the federal preemption argument advanced by CSXT. (See R. 17: VanderVeer Affidavit, Ex B.)

As set forth in more detail below, the State's administrative proceedings were never held, having been preliminarily enjoined by Order of the U.S. District Court entered on February 9, 1988 (R. 7) and later permanently enjoined by Judgment Order entered May 18, 1988 (R. 33).

U.S. District Court Proceedings

CSXT's Complaint for injunctive and declaratory relief was filed with the United States District Court for the Western District of Michigan, Southern Division, on January 22, 1988 and was assigned to the Honorable Robert Holmes Bell (R. 1). The Complaint contained three counts: Count I alleged the Department's Rule was preempted by the Federal Boiler Inspection Act, 45 U.S.C. § 22 *et seq:* Count II alleged the Department's Rule was preempted by the Federal Railroad Safety Act, 45 U.S.C. § 434; and Count III alleged the Department's Rule violated the Commerce Clause of the United States Constitution, Art I, § 8, clause 3 (R. 1).

On February 3, 1988, the UTU filed a Motion to Intervene as Intervening Defendant (R. 2). On February 4, 1988, CSXT

filed a Motion for Temporary Restraining Order, on which date UTU's Motion to Intervene was granted (R. 3, 5).

On that same date, the Trial Court entered an Order for Preliminary Injunction, restraining the Department from enforcing its Rule and from continuing the scheduled administrative proceeding until August 4, 1988 or until the Court's ruling on a Motion for Summary Judgment to be filed by Plaintiff (R. 7). The Court's Order also provided that the parties were to schedule oral argument on the Motion for Summary Judgment with the Court (R. 7).

On February 10, 1988, Intervening Defendant UTU filed a Motion to Abstain or Dismiss (R. 8). On March 8, 1988, CSXT filed its Motion for Summary Judgment, raising only two of the three grounds for relief set forth in its Complaint: preemption based on the Federal Railroad Safety Act and preemption based on the Boiler Inspection Act (R. 16). The State and the UTU filed their responses in opposition to CSXT's Motion, following which a hearing date of June 14, 1988 was agreed upon and set with the Court (R. 23, 24).

Disposition in Court Below

Prior to the date set for hearing, on May 18, 1988, the Court issued its Judgment Order granting CSXT's Motion for Summary Judgment, declaring the Department's Rule preempted by both the Boiler Inspection Act and the Federal Railroad Safety Act and enjoining further enforcement of the Rule insofar as it required commodes on locomotives (R. 33). The Court never expressly considered or ruled on UTU's Motion to Abstain (R. 33). The absence of a hearing on Plaintiff's Motion for Summary Judgment prevented the State from expressing on the record its intention to join with the UTU in its Motion to Abstain.

Both the UTU and the State filed appeals, which were consolidated by stipulation of the parties and Order of this Court.

Statement of Facts

There being no record testimony taken in the District Court, the facts of the case at bar primarily arise out of the procedural history of the case and have, for the most part, been set forth above.

The salient facts giving rise to the instant action, however, are undisputed and may be briefly stated as follows:

1. *The Michigan Department of Transportation's Rule was duly promulgated and requires railroads to make available on their locomotives adequate sanitary facilities for the health and welfare of their trainmen, enginemen, and yardmen.*

2. CSXT operates its railroad system within the State of Michigan, utilizing locomotives that have no sanitary facilities (R. 17: VanderVeer Affidavit at ¶ 5).

3. Assuming the validity of the Department's Rule, CSXT's activities fall directly within its scope.

4. The Department initiated proceedings seeking to enforce its Rule against CSXT.

5. CSXT resisted the Department's efforts by filing an injunctive action in U.S. District Court.

6. As of the date of entry of the District Court's Judgment Order, the State's police power to protect the health and welfare of its rail workers has been severely curtailed.

ARGUMENT

I. *MICHIGAN'S RULE REQUIRING TOILET FACILITIES ON LOCOMOTIVES* IS NOT PREEMPTED BY THE FEDERAL RAILROAD SAFETY ACT BECAUSE NO FEDERAL RULE HAS *BEEN ADOPTED COVERING THE SAME SUBJECT MATTER*

Michigan's Rule appears in the 1979 Michigan Administrative Code as follows:

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> "Rule 3. (1) Adequate toilet facilities shall be made available for trainmen, enginemen and yardmen, after hearing thereon and order by the commission, which toilet facilities shall be kept in a reasonably clean and sanitary condition." 1979 AC, R 460.1473(1)

The first question presented in this appeal is whether the trial court erred in ruling that Rule 460.1473(1) is preempted by the Federal Railroad Safety Act of 1970, 45 U.S.C. §§ 421-44 (1976).

The legislative history of the Railroad Safety Act makes clear that the "primary purpose" of the act is to "promote safety in all areas of railroad operations . . . ." H.R. Rep. No. 91-1194, 91st Cong., 2d Sess. (1970), *reprinted in* (1970) U.S. CODE CONG. & AD. NEWS 4104, 4104 (hereinafter referred to as "House Report No. 91-1194"). In describing the background and need for the new legislation, the Committee appraised the then existing safety statutes, including the Boiler Inspection Act, as too limited and recommended broadscale Federal and State action:

> " . . . *Consequently, there is a strong concensus which makes it appear clearly that the time is now here for broadscale Federal legislation with provisions for active State participation* to assure a much higher degree of railroad safety in the years ahead." House Report No. 91-1194 at 4105. (Emphasis added.)

The more expanded regulatory role assigned to the States is set forth in § 205 of the Federal Railroad Safety Act (45 U.S.C. § 434), which "authorizes States to regulate *in any area of railroad safety* until the Secretary [of Transportation] acts with respect to the *particular* subject matter." House Report No. 91-1194 at 4112. (Emphasis added.)

Section 205 of the Railroad Safety Act provides:

> "The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. *A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement.* A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce." 45 U.S.C. § 434. (Emphasis added.)

Thus, while uniformity is important, the States unquestionably may act in those specific areas where the federal government has not acted.

The Trial Court examined § 205 of the Federal Railroad Safety Act and correctly concluded that analysis of the

CONCLUSION AND REQUEST FOR RELIEF

Congress must express in terms permitting no other conclusion its intent to preempt the historic police powers of the States when exercising its Federal commerce power. In 1926, Congressional intent to preempt State police powers in the field of locomotive safety was inferred by judicial construction. In 1970, that inference was repudiated. In 1970, Congress expressed in clear and unmistakable terms its intent to *permit*, not

prohibit, the exercise of State power to promote rail safety. Congress ordained that the States may adopt "*any*" rule "relating to railroad safety" unaddressed by specific Federal action.

Rule 460.1473(1) requiring toilets on locomotives relates to railroad safety. No Federal rule has been adopted covering the subject matter of locomotive sanitation. The conclusion is inescapable that Rule 460.1473(1) is not preempted. Any other construction turns the Federal Railroad Safety Act on its head.

For all the reasons stated above, the State respectfully urges this Court to enter its Order reversing the Trial Court's order granting Plaintiff's Motion for Summary Judgment, dissolving the permanent injunction entered incident thereto and instead granting judgment in favor of the Defendants declaring Rule 460.1473(1) valid and enforceable.

Respectfully submitted,

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